85-1455

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSE CARLOS PRADO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIMMY PHILLIPS, JR.
Bar Card #15953000
P. O. Drawer JJ
Angleton, Texas 77515
AC 409 849-8511 (Angleton)
AC 713 482-7507 (Houston)
Attorney for José Carlos Prado

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

A. Whether the trial court's rulings concerning discovery and the refusal to grant a continuance before and during trial denied the Defendant a fair trial, the Court proceeding with the trial before the Defendant had a reasonable opportunity to prepare his case.

B. Whether, as a matter of law, the Government failed to prove the single conspiracies and RICO counts alleged in the indictment against the Defendant, José Carlos Prado, but instead proved and convicted the various Defendants of multiple conspiracies and RICO violations.

C. Whether there was such a prejudicial joinder of the Defendants, as to deny the Defendant a fair trial.

D. Whether the allegations and proof offered by the Government on the RICO counts were sufficient as a matter of law to allege and prove "enterprise".

E. Whether the charge book given to the Jury by the trial court failed to restrict the Jury to the allegations of the indictment and allowed the Defendant to be convicted on a theory or element not alleged in the indictment.

LIST OF PARTIES

DEFENDANTS:

José Carlos Prado
David Brydie Mitchell
Reinaldo Rabeiro
Robert Webster Carey, III
John Doyle

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix A hereto, infra, page A-4.

JURISDICTION

The Defendant was indicted in the Eastern District of Texas, Beaumont Division for multiple violations of drug laws. He was tried and convicted. He appealed his con-

viction to the United States Court of Appeals for the Fifth Circuit. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 26, 1985, and a timely filed Motion for Rehearing was denied on January 2, 1986. The jurisdiction of the Supreme Court is involved under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

The Constitutional Provisions and the Federal Statutes involved are attached in Appendix B.

STATEMENT OF THE CASE UNDER QUESTION A:

On June 28, 1983, a sealed indictment of forty-four (44) Defendants consisting of seventy-five (75) pages was returned by the Beaumont Grand Jury. The indictment was sealed on motion of the Government's attorney. It consisted of twenty (20) counts and covered a period of time from 1979 until 1981. The indictment and RICO counts failed to define what the Government alleged to constitute the "Enterprise" with any definiteness. The indictment was unsealed on the 12th day of July, 1983. (Tr. p. 83) On July 22, 1983, the Defendant was arraigned and posted bond. The case was set for trial on September 7, 1983. The Defendant had until August 22, 1983, to file motions and the Government had until August 22, 1983, to respond. The Appellant timely filed his motions on August 11, 1983, and a Motion for Continuance. The Government filed no opposition. The continuance was denied on August 22, 1983. Of the other Defendants set for trial, the following Motions for Continuance were filed:

Defendant	Motion Filed	Opposition (Govt.)	Motion O/R
Crisp	08/03/83	None	08/04/83
Kalish	08/03/83	None	08/04/83
Mitchell	08/15/83	None	08/08/83
Castro-Paz	08/15/83	None	08/25/83
Rabiero	08/16/83	None	08/24/83
Tarlo	08/24/83	None	09/06/83
All Defendants	09/06/83	None	09/06/83
All Defendants	09/07/83	None	09/07/83
All Defendants	09/08/83	None	09/08/83
All Defendants	09/09/83	None	09/09/83
All Defendants	09/12/83	None	09/12/83
All Defendants	09/13/83	None	09/13/83
All Defendants	09/22/83	None	09/22/83

On the 8th day of August, 1983, the Government made available to all Defendants, the documents which they would introduce at trial. No explanation was given as to how the exhibits related to the case. None of the exhibits applied to the Appellant, nor did they give him any indication as to the Government's case against him nor of the dates of the offense in question. All discovery motions under Rule 12 were denied because of the proffer by the Government. Even the supplemental motions filed after August 8, 1983, were likewise overruled.

After the all-inclusive discovery proffer on August 8th, 1983, the Government did the following:

(a) On August 19, 1983, a letter was sent to Defendants advising them of additional discovery proffer on August 26, 1983.

(b) On August 29, 1983, the Government gave notice of the trials in which their witnesses had testified without naming the witnesses.

(c) On the day of trial, Jencks and Gigilio material was delivered to the Defendants. The material was twelve (12) to fourteen (14) inches deep.

(d) The Government failed to comply with the court order to turn over all video and audio tapes concerning alleged indicted and unindicted conspirators.

(e) The Government failed to turn over all Jencks & Gigilio material available. (New material was constantly being turned over to defense counsel as the trial progressed when the witness would testify or when its existence was discoverd by the Defendants.)

The trial began on September 9, 1983. Trial proceedings necessitated the presence of counsel for the accused to be in the courthouse from 8:30 o'clock a.m. every morning until 6:00 or 7:00 o'clock p.m. every evening. Trial days were: Wednesday, September the 7th; Thursday the 8th; Friday the 9th; Saturday the 10th; Monday the 12th; Tuesday the 13th; Wednesday the 14th; Thursday the 15th; Friday the 16th; Monday the 19th; Tuesday the 20th; and Wednesday the 21st. Arguments began Thurday the 22nd and the verdict was returned on Friday the 23rd. During the trial, approximately sixty-six (66) persons were called by the Government to testify and over four hundred (400) individual exhibits were introduced by the Government. The Court allowed no time for the Defendants to prepare their presentation before beginning their evidence.

When the Government unexpectedly concluded its case in chief, the presentation schedule of the Defendants was thrown off. A request for a twenty-four (24) hour continuance was made to organize and be able to properly schedule witnesses. That continuance was denied.

ARGUMENT UNDER QUESTION A:

It has been a long standing rule in all of the Federal Appellate Courts that the granting or denial of a Motion for Continuance lies within the discretion of the court and that a trial court's ruling concerning a continuance will warrant a reversal only where that discretion has been abused.

It is equally well established that of all the rights an accused person has, the right to be represented by counsel is by far the most important, for it affects his ability to assert any other rights he may have. The Supreme Court has declared that the obligation to provide counsel is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective assistance in the preparation and trial of criminal case. *Powell v. Alabama,* 53 S. Ct. 55 (U.S. Ala. 1932). Furthermore, ". . . it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." *White v. Ragen,* 65 S. Ct. 978 (U.S. Ill. 1945). "Timely appointment and the opportunity for adequate preparation are absolute prerequisites for counsel to fulfill his constitutionally assigned role of seeing to it that available defenses are raised and the prosecution put to its proof." *Brescia v. New Jersey,* 94 S. Ct. 2630 (U.S. N.J. 1974).

'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The Answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite,* 84 S. Ct. 841 (U.S. N.Y. 1964).

In the Appellant's case, there were numerous continuances requested. However, the continuances requested are all related to the same matter as the initial request. That is, the lack of sufficient time to prepare the Defendants' case for trial and arrange an effective defensive presentation. It would be more appropriate to refer to them as renewals of the primary motion for an initial continuance:

> "What would be a reasonable delay necessarily depends on all the surrounding facts and circumstances. Some of the factors to be considered in the balance include: the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the delay is for legitimate reasons or whether it is dilatory, purposeful or contrived; whether the Defendant contributed to the circumstance which gives rise to the request for a continuance; whether the Defendant has other competent counsel prepared to try the case, including the consideration if other counsel was retained as lead or associate counsel; whether denying the continuance will result in an identifiable prejudice to Defendant's case, and if so whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case." *Linton v. Previti,* 656 F.2d 207 (C.A. 1981).

1. OTHER CONTINUANCES GRANTED

There were no previous continuances of the trial date granted to any Defendant. There were extensions of time granted to the Government which postponed discovery procedures by the Defendants:

(1) Sealing of the indictment until July 12, 1983;

(2) Motion and order extending the Government's providing an exhibit list until September 6, 1983.

2. LENTH OF DELAY REQUESTED

Since by order of the Court all motions and objections of any one Defendant were automatically adopted by all Defendants unless they specifically requested not to have them apply, each request can properly be considered in behalf of all Defendants. The requests are as follows:

Date	Defendant	Length	Reference	
08/11/83	RABIERO	120 days	Vol. III,	p. 629
08/11/83	MITCHELL	6-8 weeks	Vol. III,	p. 530
08/11/83	PRADO	120 days	Vol. I,	p. 204
08/16/83	CASTRO	Reasonable	Vol. IX, 2nd sup.	p. 924
08/31/83	DOYLE	21 days	Vol. IV,	p. 938
09/01/83	PRADO	Reasonable	Vol. V,	p. 1101
09/05/83	PRADO	Reasonable	Vol. V,	p. 1110
09/06/83	CASTRO	Reasonable	Vol. X, 2nd sup.	p. 1045
09/07/83	PRADO	2 weeks	Vol. V,	p. 1140
09/08/83	CASTRO	2 weeks	Vol. X, 2nd sup.	p. 1116
09/09/83	MITCHELL	1 week	Vol. V,	p. 1169
09/09/83	CARY	Not specified	Vol. VII,	p. 1628
09/12/83	PRADO	1 week	Vol. VII,	p. 1639
09/13/83	CASTRO	1 week	Vol. X, 2nd sup.	p. 1157
09/20/83	PRADO	24 hours	Vol. VI,	p. 1382

None of the lengths of delay requested were excessive. Each have a reasonable relation to the purpose for which a continuance was necessary. Even the initial period requested of one hundred twenty (120) days was not unreasonable because of the complexity of the case, the familiarity of the Government with their evidence, the length of time which had passed since the commission of the offenses alleged (more than three (3) years), and the length of the time which the Government had to prepare their case for trial.

3. ACTIONS OF GOVERNMENT HINDERING THE DEFENDANTS' PREPARATION

From the filing of the indictment through the conclusion of the trial, the actions of the Government through its agents and attorneys contributed to the confusion surrounding the case and hampered the preparation and presentation of the Defendants' defenses at trial.

(1) The indictment was sealed until the 12th day of July, 1983, so that even if a Defendant had known of its presentation, he would not have known of its allegations until that date.

(2) A proffer of more than four hundred (400) exhibits was made on August 8, 1983, and was made to the Defendants without any explanation as to the connection of the exhibits with the case or to which of the Defendants the exhibits would apply.

(3) Additionally, the proffer of exhibits conveyed to the Court hearing the discovery motions the impression that *all* materials and evidence which the Defendants were entitled under the Rule 16 discovery was shown thereby causing the Court to overrule all Rule 16 discovery motions.

(4) On August 26, 1983, the Government proffered a second viewing of the exhibits "inadvertently" not shown on August 8, 1983. These too were without explanation as to how they were connected to the case or to which Defendants they were connected.

(5) On August 26, 1983, the Government mailed notice of trial testimony to the Defendants at a time when it was impossible for the Defendants to obtain, much less assimilate, the various trial transcripts. The total trial transcripts were necessary since the Defendants had

no knowledge of which witnesses who testified there would be used.

(6) On September 1, 1983, the Government sent to the Defendants information concerning scientific evidence and expert testimony; a time when they knew that the Defendant had no opportunity to inspect and analyze the substance and prepare his own expert to testify. Furthermore, this information was available to the Government in 1981 and should have been produced on August 8, 1983.

(7) The Government represented to the Court that all Jencks Act and Gigilio material would be turned over by the Government twenty-four (24) hours prior to trial. They did not. In fact, some of it never arrived. And because of the inability to properly investigate before the conclusion of the trial, the Defendant is not able to determine what other materials were not furnished. Additionally, throughout the trial, the Government would turn over other Gigilio and Jencks material as each witness testified or the Defendants found out it existed.

(8) Although requested, the Government did not turn over video and audio surveillance tapes until midway through the trial. At that point, they claimed there was nothing discoverable on them.

(9) There was a photographic line-up book used for identification in the Florida trial which was not shown to Defendants at the discovery on August 8, 1983 or August 26, 1983.

4. DILIGENCE OF THE DEFENDANTS

It cannot be said that there was a lack of diligence on the part of the Defendants. In addition to the written

motions filed numerous times during the trial, motions for short delays were requested to provide for at least some sort of cursory preparation: complaint that there was insufficient time to compare exhibits; there was no time to read, digest, and assimilate the Jencks and Gigilio materials; there was insufficient time to read one of the four (4) trials at which witnesses testified about related matters which consisted of four thousand nine hundred (4,900) pages; complaints of inadequate time to prepare; complaint of insufficient facts to continue cross-examination.

5. TRIAL COURT'S ASSISTANCE

Although never slowing his relentless pace regarding the expeditionsness of the trial and remaining steadfast in his attitude to complete the trial without any continuance or delay, the trial court endeavored to assist the Defendant's trial counsel in obtaining some of the discovery items which existed in various sister states. He was unable to secure the presence of papers which had been sealed and testimony which had not yet been transcribed.

On the afternoon of September 15, 1983, the court remarked,

> "We are not going to interrupt this trial to run down the court reporter and get that typed on a matter that is fully developed on the record with minimal additional relevance. I overrule the motion."

Appellant does not understand how the Judge knew that the contents of the hearing requested could have already been fully developed. The only explanation would be that trial court was frustrated over his attempt for

more than a week to get one simple document from court records in New Orleans when his attempt had become more difficult than he imagined.

6. FAULT OF THE DEFENDANTS

As shown by the record of the trial, the Defendants' attorneys were without fault in the necessity of the delay. After being hired, all attorneys timely filed pre-trial motions and began assimilation of evidence in an attempt to piece together the Government's theory (which was not clear even after the conclusion of the evidence) and prepare defenses for their clients. It was an impossible task to accomplish within the trial limits set by the court because of the sheer logistics of the case. The evidence eventually introduced would span four (4) different states and a time period of three (3) years. Some Defendants' involvement having ended four and one half (4½) years prior to the indictment.

7. WHETHER THE DEFENDANTS HAD BEEN UNPREPARED BECAUSE OF A CHANGE OF COUNSEL

With the exception of David Mitchell, all of the Defendants had the counsel who were originally hired and none of the Defendants except David Mitchell used as a reason for the continuance "a change or lack of attorneys".

8. DEVELOPMENT OF THE CASE BY THE GOVERNMENT

The investigation of the matters alleged in the indictment began in 1979. It was investigated by the IRS, the DEA, and the Coast Guard. It spanned several states. Six (6) grand juries prior to the one in Beaumont in-

quired into it and indicted individuals for crimes in their jurisdiction. They were the Grand Jury in New Orleans, Miami, Jacksonville, Panama City, Atlanta, and Galveston. Operation Grouper, of which this case is part, had been in existence for two and one half (2½) years. The Jencks material consisted of a stack of papers twelve to fourteen (12-14) inches thick. The Government *HAD IN POSSESSION* the following transcripts:

(1) The Ocala Trial;
(2) The Panama City Trial (portions);
(3) Grand Jury Proceedings Miami;
(4) Grand Jury Proceedings New Orleans;
(5) Portions of the Trial of Steven Kalish;
(6) Portions of another Galveston Trial; and
(7) Portions of a copy of Boren's Trial.

Agent Bob Dey worked the case exclusively six (6) months prior to the indictment and the Government prosecution team had organized their case with each respective prosecutor being assigned specific tasks so the others could prepare their respective witnesses and attend to trial preparation during the trial proceedings.

9. BALANCED CONVENIENCE AND INCONVENIENCE OF THE WITNESSES, ATTORNEYS, AND THE COURT

Motions for Continuance were being filed in the first half of August. The reasons for the later motions filed closer to trial and during the trial were the same—LACK OF TIME TO PREPARE. There is no evidence in the record which would support any contention of inconvenience to witnesses, the court, or to the Government if in August the trial would have been continued sixty to

ninety (60-90) days. There was no objection to the continuance requests filed by the Government. It was only the relentless insistence of the trial Judge that prevented the Defendants from having adequate time to prepare for trial.

10. WHETHER THE DENYING OF THE CONTINUANCE WILL RESULT IN PREJUDICE TO THE DEFENDANT'S CASE

"Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a Defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the Defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge." *Moore v. U. S.*, 432 F.2d 730 (C.A. 3, 1970) (en banc). *Brescia v. New Jersey, supra.*

"The factors that must be analyzed to determine whether the given preparation time was sufficient to permit the attorney to effectively assist his client include: '(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.'" *U. S. v. Golub,* 638 F.2d 185 (C.A. 10, 1980); *U. S. v. King,* 664 F.2d 1171, (C.A. 10, 1981). It is clear that the Government had all the time they desired to prepare the case; that they possessed the entire transcripts or the portions thereof of the Grand Jury sessions at the various trials that they deemed necessary for the presentation of their case. They had all documentary evidence listed and

catalogued. They had at least sixty-six (66) witnesses interviewed, sorted and ready for what they believed to be the best order of presentation for their case. It is equally clear that by waiting until the eve of trial to inform the Defendants, they were able to strategically prevent the Defendants from gaining access to the necessary transcripts of the previous trials and analyze the materials for evidence and theories necessary to adequately locate potential witnesses and to prepare adequate defenses for their respective Defendants, much less have sufficient time to interview the potential witnesses and locate and prepare documentary evidence necessary to substantiate those defenses.

The tremendous strategic advantage of the team of government prosecutors was overwhelming when coupled with the insistent attitude of the court in trying the case six (6) days a week from 9:00 o'clock a.m. until 6:00 or 7:00 o'clock p.m. every day. The Defendants having insufficient time to develop their own witnesses and documentary evidence, were stripped of all possible defensive tools except the use of cross-examination of the witnesses presented and developing inconsistencies with the Government's witnesses themselves. This being the weakest defense possible without affirmative evidence being presented.

"A myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite,* supra, 84 S. Ct. 849 (U.S. N.Y. 1964).

A prime example of the court's refusal to allow ample opportunity for preparation is seen in the court's refusal to grant the Appellant's request for a twenty-four (24)

hour continuance to secure the presence of two witnesses who were testifying in another trial.

The Government's response to the matters was that because one of the Defendants knew of some video tapes before the local prosecutor and because Jencks material was furnished during trial for cross-examination that the Appellants suffered no prejudice. They ignore the question that the Defendant has a right to prepare *BEFORE TRIAL* and not to be required to put together a hasty defense during trial, no matter how well he does it. Had the Defendant had more time he could have better prepared his proof and his cross-examination of government witnesses to show that under the allegations of the indictment he was not guilty.

Historically, the increased criminal case load prevented the prompt disposition of criminal cases as was envisioned by the United States Constitution. A movement was begun to bring the criminal case to trial quickly which resulted in legislation guaranteeing dismissal if the criminal case was not promptly tried. The harm created by abusing the intent of the Speedy Trial Act and forcing the Defendant to trial without adequate preparation is far greater than that which an inappropriate delay would produce. The former being more devastating than the latter.

"The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a Defendant charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." *Powell v.*

Alabama, 53 S. Ct. 55, 60 (U.S. Ala. 1932). The facts of this case fits the five (5) prong test of *U. S. v. King,* 664 F.2d 1171 (C.A. 10, 1981); The same facts also satisfy the requirements of *Alford v. U. S.,* 709 F.2d 418 (C.A. 5, 1983). A reversal and remand for retrial is therefore required.

As a country boy from Texas would say, the facts of this case violate the TAIN'T FAIR RULE . . . that is, taking all the facts and circumstances into account, it just TAIN'T FAIR and there should be something done about it.

STATEMENT UNDER QUESTION B; QUESTION C; AND QUESTION D:

1. THE SOURCES

Although the indictment alleged one giant conspiracy and RICO, the evidence presented showed substantially four distinct and separate sources of *marijuana.*

2. ECONOMIC RESPONSIBILITY

Each group, whether it composes one or more of the defined functions, operated independently, economically and anatomically. That is to say if that group lost the marijuana while it was in their possession, they suffered the economic loss. That loss was not passed on between the groups. Each group had its own boss and employees, and the employees within that group were responsible only to other members of their respective group. Each shipment was a different transaction. There was no continuing agreement to supply or to buy and they did not share their profits.

3. MARIJUANA AND ITS POINT OF ORIGIN

(1) Jose Segura Group—Colombians

(2) Cotes Brothers Group—Colombians

(3) Lustre Brothers Group—No direct evidence.

(4) Jesus Carnet Group—No direct evidence.

4. THE SHIPMENTS OF MARIJUANA

(A.) December, 1978—Albieta Springs (22000 lbs.):

Carnet used his own farm. Tony received the marijuana from Mr. Carnet at the farm and he brokered the marijuana to Govern Group.

(B.) February, 1979—Kountz Farm (27000 lbs.):

Diego Morales checked out Carnet farm in Texas. When Carnet called that a load was ready, Fernandez Group went to Kountz farm.

(C.) April - May, 1979—Silo Farm (42000 lbs.):

Carnet called and said he had a load coming in at Kountz farm. Because of difficulties, it went to rice silo farm.

(D.) May, 1979—I-45 Farm (23000 lbs.):

Lopez and Fernandez began talking about getting loads. Lopez's partner at this time was Castillon. Lopez had a boat and arranged for a farm. He and Fernandez agreed to work *TOGETHER* on *THIS* particular load. Fernandez group waited in house until load was at farm. Lopez made independent sale at Dickinson house of

7000 lbs., 23000 lbs. went to I-45. The rest of load coming from the mother ship was lost when discovered by the police. Fernandez group was waiting at home. The source was Jose Segura.

(E.) December 4, 1979—Jasper Farm (48000 lbs.):

Cotes sent load to Lopez-Fernandez. Lopez-Fernandez group were the smugglers and brokers. The marijuana went to the Jasper farm.

(F.) December 11, 1979 (amount unknown):

Rufin Brothers had a load they were going to bring into the United States. The boat got caught.

Owner of the load was the Rufin Brothers not Fernandez. Tony just the broker.

(G.) December 19, 1979—Jasper Farm (20000 lbs.):

Carnet called and said he had a load. Morales does not know from where.

It was an independent operation, Fernandez bought it from Jesus.

(H.) January 20, 1980 ("Dumped" 55000 lbs.):

Cotes had a load of marijuana. Kalish and Miles were to bring the load in. Miles would pick up the merchandise in the Gulf and bring it to the "hole" at 2004.

(I.) February, 1980—Jasper Farm (42000 lbs.):

Carnet had another load. Load went to the Jasper Farm.

ARGUMENT UNDER QUESTION B; QUESTION C; AND QUESTION D

The General Conspiracy Counts:

The Government alleged two general conspiracies between all Defendants in the indictment. One was a conspiracy to smuggle. The other conspiracy was to possess with the intent to distribute. No predicate acts were alleged and the Defendants filed several Motions for a Bill of Particulars which was denied. The Appellant contends that there was no single conspiracy shown for either smuggling or possession with the intent to distribute. Instead, there were nine or more different conspiracies shown.

Conspiracies to distribute narcotics have generally been considered to be prime examples of chain, or interconnected conspiracies, in which a participant in a segment of the conspiracy may be convicted of participation in the whole. *U. S. v. Michelena-Orovio,* 719 F.2d 738 (C.A. 5, 1983). In determining the existence of a conspiracy, if the evidence establishes (1) a common agreement, (2) knowledge of the agreement by the Defendant, and (3) that the Defendant voluntarily joined the unlawful scheme. A conspiracy is proved without regard to its shape or other configurations, *United States v. Littrell,* 574 F.2d 828 (C.A. 5, 1978). However, as pointed out in *Kotteakos v. United States,* 66 S. Ct. 1239 (U.S. N.Y. 1946), one should not confuse the common purpose of a single conspiracy with several, though similar purposes of several independent conspiracies.

The evidence demonstrates a conspiracy to possess marijuana with the intent to distribute being formed between

the members of various individual groups; and in some instances, a conspiracy to smuggle marijuana between the members of a smaller number of the same groups. Even if these groups could be connected under a "chain" conspiracy theory, the distribution of each shipment forms a different conspiracy. This is because all of the various groups (Carnet, Segura, Cotes Brothers, Rufin Brothers, Lopez-Castillon, Kalish, Fernandez, Lopez-Fernandez, Mitchell, Doyle, and Govern) were anatomically separate.

(1) Each had its own internal organization and its own hierarchy of bosses and employees.

(2) Each was individually economically responsible and did not share its losses or profits with the other groups.

(3) Each group made a determination as to whether to participate in the distribution of that shipment based on the availability of the merchandise and the amount of the sales price. No group depended upon the other group's business for its success.

There was no agreement introduced into evidence as to the amount, when, where, or under what circumstances there would be successive loads and no such agreement existed. There were therefore at least nine (9) separate conspiracies proved.

The Appellant, however, recognizes the attitude of the appellate courts with regard to the separation of conspiracies and the fact that where "the participants shared a continuing, common goal of buying and selling marijuana for profit; the operations of the conspiracy followed an unbroken chain and repetitive pattern; and the cast of conspirators remained relatively the same" there

was a single conspiracy. *U. S. v. Ruigomez,* 576 F.2d 1149 (C.A. 5, 1978). Under these circumstances, there were a minimum of six (6) separate conspiracies proved by the Government.

In this analysis, the Appellant assumes that the same buyers remained at the bottom of the chain of distribution forming the hub of the wheel with the separate and individual SOURCE forming the tips of the spokes, i.e., there was a multiple of chain terminating in the hub of the wheel. (See Exhibit "A") Each spoke meets the test set forth by this court in *U. S. v. Ruigomez,* supra and *U. S. v. Kalish,* 690 F.2d 1144 (C.A. 5, 1982): (1) continuing goal; (2) same cast of participants; and (3) a repetitive pattern. None of the sources were joined by any common denominator other than the fact that they sold marijuana in bulk. The success or failure of the Source's venture was not dependent on the success or failure of the other Source. There is no evidence that any source knew of the specific business dealings of the other. They were economically and anatomically independent.

The conspiracies were similar to those in *Kotteakos v. U. S.,* supra and *U. S. v. Sutherland,* 656 F.2d 1181 (C.A. 5, 1981), in which the court held, "Like the multiple conspiracies in *Kotteakos,* these agreements share a common conspirator and similar objectives, but are otherwise unrelated . . ." if there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object; the wheel is incomplete, and two conspiracies rather than one are charged. *U. S. v. Levine,* 546 F.2d 658, 663 (C.A. 5, 1977). Reversing an opinion of the Court of Appeals, the Supreme Court wrote "that right [the

substantial rights of the parties], in each instance was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record." *Kotteakos v. U. S.*, supra.

Multiple RICOS And Sufficiency:

In this case, the object of a RICO conspiracy is an agreement to *violate* a substantive RICO provision, i.e., to conduct or participate through a pattern of racketeering activity. The gravamen of the conspiracy charge is not that the Defendants agreed to sell narcotics, rather it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. *U. S. v. Elliott,* 571 F.2d 880 (C.A. 5, 1978). Therefore, there are three requirements:

(1) There must be an enterprise as defined by the indictment;

(2) The Defendant must necessarily know of the enterprise; and

(3) There must be an agreement to commit two predicate acts in the furtherance of that Enterprise.

The allegations of the indictment Count 2 unlike Count 1 alleges a definition of the enterprise and that twenty-seven (27) Defendants entered into the conspiracy with that "enterprise". The Government failed to prove the "enterprise alleged". In light of the evidence most favorable to the Government, without regard to whether it is admissible or not, the *group alleged* was an impossibility.

(1) The only two persons who were "smugglers" were Jesus Carnet and Armando Lopez. Jesus Carnet had his own complete organization including the ownership of

the farm where the marijuana was sold and distributed. He never worked with nor was he shown to have had any business dealings with Armando Lopez.

(2) Armando Lopez dealt with Tony Fernandez sometime after the sales from Jesus Carnet began. He had one shipment while José Carlos Prado worked for Tony Fernandez. After José left the employment of Tony, Armando Lopez and Tony Fernandez formed an "enterprise" for the purpose of smuggling and distribution of marijuana.

(3) The Fernandez Group never joined with the Carnet Group to form an enterprise.

(4) John Doyle and David Mitchell were competitors —their interests were antagonistic to one another and the record is clear that they never reached agreements between themselves. Neither did they combine or confederate to establish a criminal enterprise for the purpose of importing into the United States marijuana. They bought marijuana when and as it was available at a price agreeable to them.

(5) José Carlos Prado was an employee of Tony Fernandez and Tino Guevara. His only agreement was to weigh the marijuana where it was being sold and to collect the money which was due from Tony's buyers and deliver the money to Tony or wherever he wanted. It was never shown that he combined with any other group or reached any other type of agreement.

Also as with the conspiracy counts concerning smuggling and possession with intent to distribute marijuana, there was no connection between the spokes of the wheel of the various chains; there were more than four inde-

pendent enterprises proved. It appears, although not alleged in that manner, that the Government's theory of the enterprise is that it is the smuggling and distribution of marijuana generally by anyone involved with Tony Fernandez, and he is the only possible link between all of the persons named in Count 2. Again this would be an impossibility because of the lack of knowledge between various groups and their relative independence of one another.

The Government's theory is not viable and has been rejected in *U. S. v. Sutherland,* 656 F.2d 1181 (C.A. 5, 1981) wherein this court wrote:

> "Elliott does not stand for the proposition that multiple conspiracies may be tried on a single "enterprise conspiracy" count under RICO merely because the various conspiracies involve the SAME ENTERPRISE. What Elliott does state is two-fold: (1) A pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the Defendants have agreed to commit a substantive RICO offense; and (2) such agreement to violate RICO may, as in the case of a traditional 'chain' or 'wheel' conspiracy, be established on circumstantial evidence, i.e. evidence that the nature of the conspiracy is such that EACH DEFENDANT MUST NECESSARILY HAVE KNOWN THAT OTHERS WERE ALSO CONSPIRING TO VIOLATE RICO." [emphasis added].

In this case, the Government has not attempted to prove that Jesus Carnet, Jose Segura, the Cotes Brothers, the Rufin Brothers, Julio Maresma, José Carlos Prado, Stephen Michael Kalish, Dave Mitchell, John Doyle, and others agreed with EACH OTHER to participate in a

drug smuggling or marijuana distribution scheme, nor did they must necessarily have known of each other's existence. The Appellants were prejudiced by the joint trial of the multiple conspiracies involved in this case on a single RICO conspiracy count. The conviction should therefore be reversed if the trial affected the Appellant's substantial rights.

There were potentially a minimum of four (4) separate RICO conspiracies. Three of which were formed after the Appellant ceased to work as a broker's helper in May of 1979. There are potentially thirteen (13) single RICO enterprises of which the Appellant was only the member of one—The Fernandez Group (Tony Fernandez, Tino Guevara, Diego Morales, and José Prado). After the Appellant left his group, there were extensive negotiations and reorganization as to the functions and goals of the group, thereby creating a new agreement and conspiracy. (Vol. XVI, p. 1449-1450) Most of the evidence introduced at trial dealt with persons and marijuana dealings of which the Appellant had no knowledge and which occurred outside the realm of his alleged criminal dealings.

The facts of this case exceeds the tests to determine prejudice used by this court in *U. S. v. Sutherland,* supra, and *Kotteakos v. U. S.,* supra, to determine if the Appellant's substantial rights were affected:

(a) Instead of two (2), there were from (4) to (15) RICO conspiracies shown by the proof.

(b) Instead of three (3), there were fourty-four (44) Defendants named and proof of even more offered.

(c) The evidence of each conspiracy was not clearly distinct. Because of the various combinations and associa-

tions of the parties and their movement from one conspiracy to another there was a great spillover effect. This was not cured by a precise charge to the jury by the court.

(d) The Government in its argument attempted to link all the Defendants together in a single, giant RICO conspiracy.

(e) The evidence concerning the Appellant was minimal. It consisted of the testimony of only two persons who were shown to be heavy cocaine users and participants who had made deals with the Government. Out of more than four hundred (400) pieces of documentary evidence not one connected the Defendant with the crimes alleged in the indictment.

This case was in essence a prime example of the Government's attempt to convict all the Defendants, little and big, by a trial in mass.

> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. . . . With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried EN MASSE for the conglomeration of distinct and separate offenses committed by others as shown by this record." *Kotteakos v. U. S.*, 66 S. Ct. 1239, 1252, 1253 (U.S. N.Y. 1946).

Because the Government failed to prove the conspiracy as alleged, but only proved at best multiple importation, distribution, and RICO conspiracies, and because such acts substantially affected the right of the Defendant to a fair trial, the conviction should be reversed and a new

trial should be granted unless the evidence is insufficient to convict the Defendant under Count 1, Count 2, Count 13, and Count 14 of the indictment in which event the conviction should be reversed and the prosecution dismissed. Furthermore, your Defendant believes that a reversal of the entire conviction would be proper because of the prejudicial joinder and trial of those counts with the other counts of the indictment and the failure of the Government to allege and prove a business entity under the RICO counts.

STATEMENT UNDER QUESTION E:

Upon reading the charge to the Jury, the court gave them a written book containing definitions and elements of the offenses. He instructed them according to its use to determine the elements the Government must prove. (Appendix C)

ARGUMENT UNDER QUESTION E:

It is elemental that the Defendant cannot be convicted of offenses not alleged in the indictment. *U. S. v. Thetford,* 676 F.2d 170 (C.A. 5, 1982). Plain reversible error occurs where the court authorizes the Jury to convict on a theory or element not alleged in the indictment. *U. S. v. Carroll,* 582 F.2d 942 (C.A. 5, 1978). Common knowledge dictates that the verbal instructions are forgotten long before the written instructions. The Judge's charge book presents elements and definitions which allowed the Defendants to be convicted of elements and theories not alleged in the indictment.

The indictment alleges in Count 15 that the Defendant traveled in interstate with intent to promote (etc.) smug-

gling and distribution of marijuana. The *Court's Book* allowed the Defendant to be convicted on Court 15 if he promoted an "unlawful activity", i.e. "any 'business enterprise' involving *controlled substances* in violation of the laws of the United States." (Court Book Elements (page 9, Definitions page 5)). Other non exclusive sampling of examples are as follows: *Count 1* (1) fails to restrict consideration to the enterprise alleged in the indictment; (2) fails to require that all Defendants be associated with the same enterprise; *Count 2* (1) and (2) above and (3) fails to require that the enterprise composed of the group as alleged in the indictment; *Count 3 through 7* (4) fails to require that the controlled substance be marijuana; *Count 8 through 11* (4) above and (5) fails to require proof of the acts on the date alleged in the indictment; *Count 13* (6) that the conspiracy occurred during the dates alleged in the indictment; *Count 14* same as (6) above.

Because the court in its specific written instructions allowed the Jury to convict the Defendant on theories and elements of the offenses which were not alleged in the indictment, the Defendant was denied a fair trial and his Constitutional right to be tried only on the allegations of the indictment. The court in doing so committed plain error which was of such a substantial nature as to require that the Appellant's convictions should be reversed and a new trial granted.

CONCLUSION

The Defendant prays that this Court grant his Writ of Certiorari and thereafter dismiss the criminal charges against him, or in the alternative, reverse the conviction and grant him a new trial.

Respectfully submitted,

JIMMY PHILLIPS, JR.
Bar Card #15953000
P. O. Drawer JJ
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AC 409 849-8511 (Angleton)
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Attorney for José Carlos Prado

CERTIFICATE OF SERVICE

I hereby certify that three copies of Appellant's Petition for Writ of Certiorari were served upon the adverse party by certified mail this 21 day of February, 1986.

JIMMY PHILLIPS, JR.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

NO. B-83-18-CR (6)

UNITED STATES OF AMERICA

v.

JOSE CARLOS PRADO

(Filed November 21, 1982)

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, November 21, 1983, with counsel, Jimmy Phillips, Jr., pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offenses of conspiracy to violate racketeer influence and Corrupt Organization Act, in violation of 18:1962(c) and 18:1963(a)(1), Count 1; violation of racketeer influenced and Corrupt Organizations Act, in violation of 18:1962(d) and 18:1963(a)(1), Count 2; possession with intent to distribute Marihuana, in violation of 21:841(a)(1) and 21:841(b)(6) and 18:2, Counts 3 and 4; illegal importation of Marihuana, in violation of 21:952 and 21:960(a)(1) and 18:2, Counts 8 and 9; conspiracy to distribute and possession with intent to distribute marihuana, in violation of 21:846, Count 13; conspiracy to import Marihuana, in violation of 21:963, Count 14;

interstate travel in aid of racketeering, in violation of 18:1952(a)(3) and 18:2, Count 15, as more fully set out in the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) Years and to pay a fine of $25,000.00, as to COUNT 1;

Ten (10) Years to run concurrent with COUNT 1, and to pay a fine of $25,000.00, as to COUNT 2;

Five (5) Years and to pay a fine of $15,000.00, as to COUNT 3;

Five (5) Years and to pay a fine of $15,000.00, as to COUNT 4;

Five (5) Years and to pay a fine of $15,000.00, as to COUNT 8;

Five (5) Years and to pay a fine of $15,000.00, as to COUNT 9;

The sentence imposed in COUNTS 3, 4, 8 and 9 are to run concurrent with each other, but to run consecutive to sentence imposed in COUNT 1. Special Parole Term: Three (3) Years on COUNTS 3 and 4 running concurrently to each other, and Three (3) Years on COUNTS 8 and 9 running concurrently to each other and consecutive to COUNTS 3 and 4.

Five (5) Years and to pay a fine of $15,000.00, as to COUNT 13;

Five (5) Years and to pay a fine of $15,000.00, as to COUNT 14. The sentence imposed in COUNTS 13 and 14 to run concurrent with each other, but to run consecutive to sentences imposed in COUNTS 1, 2, 3, 4, 8 and 9.

Five (5) Years to run concurrent with COUNT 1, and to pay a fine of $10,000.00, as to COUNT 15.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

/s/ ROBERT M. PARKER
U. S. District Judge

APPROVED: /s/ W.R.

Date: November 21, 1983.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2717

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID BRYDIE MITCHELL, JOSE CARLOS PRADO, REINALDO RABEIRO, ROBERT WEBSTER CARY, III, and JOHN DOYLE,
Defendants-Appellants.

Filed November 26, 1985

Before: Thomas M. Reavley, and E. Grady Jolly, Circuit Judges, and Mahon,* District Judge.

Opinion by Judge E. Grady Jolly

Appeals from the United States District Court
for the Eastern District of Texas
Robert M. Parker, District Judge, Presiding

SUMMARY

Criminal Law/Criminal Procedure/RICO

Appeals from convictions. Affirmed.

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* District Judge of the Northern District of Texas, sitting by designation.

Defendants were engaged in a conspiracy to import large quantities of marijuana from South America to Texas and Louisiana between December 1978 and November 1980. Defendants Mitchell, Doyle, Prado and Rabeiro were convicted on one count of conducting affairs of an enterprise through a pattern of racketeering activity, and one count of conspiracy to commit the offense. 18 U.S.C. § 1962(c), (d). All defendants were convicted on one count of conspiring to possess marijuana with the intent to distribute, and one count of conspiracy to import marijuana. 21 U.S.C. §§ 846 and 963. Mitchell and Rabeiro were convicted on three counts, and Prado and Doyle on two counts of distributing and processing marijuana with the intent to distribute and aiding and abetting that offense. 21 U.S.C. § 841(a)(1). Rabeiro was convicted on four counts, Mitchell on three counts and Prado and Doyle on two counts each of importing marijuana and aiding and abetting that offense. 21 U.S.C. § 952; 18 U.S.C. § 2. Finally, Mitchell, Doyle, Prado and Rabeiro were convicted of one count of interstate travel to promote the importation and possession of marijuana. 18 U.S.C. § 1952 (the Travel Act). Mitchell, Doyle, Prado and Rabeiro were sentenced to twenty years imprisonment and fined $90,000 each. Cary was sentenced to five years imprisonment. All appeal.

[1] Defendants suffered no prejudice from the denial of their continuance motions. All defendants had over 40 days from the time of their arraignment to prepare for trial. Although the government provided a large amount of Jencks Act and *Brady* materials the day before trial, and other such materials during trial, there has been no showing that the defendants failed to receive the materials in time to effectively cross-examine witnesses. The first request for production of certain video and

audio tapes was made on the first day of trial. Thus, production midway through the trial was timely. Sentencing reduction materials were made available to defendants as soon as they were released from seal in other federal courts.

[2] Although it is a fundamental principle of due process that a defendant be afforded a reasonable opportunity to be represented by chosen counsel, an accused is entitled only to a fair and reasonable opportunity to obtain particular counsel. [3] In determining whether a continuance should be granted to enable a defendant to have counsel of his own choice, the district court should consider: (1) the length of the requested delay; (2) whether the lead counsel has an associate who is adequately prepared to try the case; (3) whether other continuances have been requested or granted; (4) the balanced convenience or inconvenience to the litigants, witnesses, opposing counsel and the court; (5) whether the requested delay is for a legitimate reason or whether it is dilatory and contrived; and (6) whether there are other unique factors present. The district court considered these factors and concluded that the motion for continuance should be denied. [4] There was no abuse of discretion even though the denial resulted in Mitchell being unrepresented throughout the trial. In addition, the district court found that Mitchell and his attorney requested the continuance in bad faith and for the purpose of delay, and that Mitchell attempted to manipulate the court's schedule by retaining an attorney he knew to have a conflict. [5] Failure to secure counsel under these circumstances operates as a waiver of one's right to counsel.

[6] To establish a violation of 18 U.S.C. § 1962(c) (RICO count), the government must prove the existence

of an enterprise, the defendant's employment by or association with that enterprise, and the defendant's conduct of or participation in the conduct of the enterprise's affairs through a pattern of racketeering activity. The government must prove not only that there was a pattern of racketeering activity, but that it was conducted through a defined enterprise.

[7] An indictment is sufficient if it contains the elements of the offenses charged, fairly informs the defendant of the charges he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions for the same offense. Here, the substantive RICO count defined the enterprise as "a group of individuals associated in fact, to promote and facilitate the illegal importation and smuggling of multiton quantities of marijuana * * * into the United States from places outside the United States, and the distribution of said marijuana." The RICO count also delineated 14 acts of racketeering activity specifically. Defendants received adequate notice of the charges against them and the enterprise was adequately defined.

[8] The government need not always demonstrate an actual agreement among the various conspirators, or even actual knowledge of each other to establish a single conspiracy. Conspiracies to distribute narcotics, such as here, have generally been considered to be a prime example of a chain or interconnected conspiracy in which a participant in a single segment of the conspiracy may be convicted of participation in the whole. Thus, there was not an impermissible variance between the proof at trial and the enterprise alleged in the indictment. There is a similarity in time, persons, offenses, places, and overt acts among the shipments.

[9] The evidence was sufficient to support defendant Prado's convictions on the underlying racketeering counts, the importation conspiracy, importation and distribution counts, the substantive RICO, RICO conspiracy, and Travel Act counts. Likewise, the evidence was sufficient to support the convictions of [10] defendant Doyle, [11] defendant Rabeiro, and [12] defendant Cary on the various counts of which they were convicted.

[13] Defendant Doyle did not meet his burden of proving that the grand jury's will was overborne by the prosecutor's questioning of two witnesses about their involvement in the scheme and the prosecution's failure to inform the graund jury that the two were unable to identify a photograph of Doyle two days before the grand jury appearance.

[14] Doyle's double jeopardy rights were not violated by the court's imposition of consecutive sentences on the marijuana conspiracy counts. 21 U.S.C. § 846 and the RICO conspiracy count, 18 U.S.C. § 1962(d). Congress intended to authorize cumulative punishment and each provision requires proof of a fact that the other does not under the test of *Blockburger v. United States,* 284 U.S. 299 (1932).

OPINION

E. GRADY JOLLY, Circuit Judge:

In this case, charging numerous violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and federal narcotics laws occurring between December 1978 and November 1980, many defendants were involved, and many issues are now raised. Some of the defendants pleaded guilty, some were dismissed, some

were acquitted, and of the nine whose cases finally went to the jury, five were convicted. The district court imposed fines upon four and sentenced all to prison terms. All not appeal.

I

The evidence showed that the defendants were engaged in a conspiracy to import large quantities of marijuana from South America to Texas and Louisiana between December 1978 and November 1980. The defendants filled four basic roles in the conspiracy. (1) Suppliers were those who procured the marijuana in South America, and transported it to the Gulf of Mexico in a mother ship. (2) Smugglers took the marijuana from the mother ship to the shore line and then to a point inland. (3) Brokers arranged the transactions between the suppliers, smugglers and the major wholesale buyers. (4) Wholesale buyers, in turn, distributed the marijuana to smaller buyers for sale on the street.

With two exceptions, the suppliers were either Dario and Enrique Cotes (the Cotes brothers), or Jesus Carnet, none of whom are parties to this appeal. In addition to being a supplier, Carnet also occasionally functioned as a smuggler. Jose Fernandez, who also is not a party to this appeal, played the key role in the scheme by serving as the broker on all shipments. The defendant Reinaldo Rabeiro was Carnet's employee and thus primarily associated with the smuggling operation and, to a lesser extent, the supplier operation. The defendants John Doyle and David Mitchell were major buyers. The defendant Robert Cary captained a vessel used in transporting the marijuana from a mother ship to the Texas shore and was thus associated with the smuggling operation. One of the gov-

ernment's primary witnesses, Diego Morales, helped Fernandez in the smuggling and broker operations by unloading marijuana from trucks, weighing the marijuana and collecting money from the wholesale buyers. The defendant Carlos Prado was also associated with Fernandez and served in the same role as Morales. Fernandez, Prado and Morales will sometimes be referred to collectively as the Fernandez group.

The facts leading up to the defendants' arrest are lengthy and complex. They are contained in a forty-five-volume record and concern events and parties not relevant to this appeal. For simplicity, we will briefly summarize only the material facts surrounding the eleven shipments and each defendant's involvement.

The Abita Springs Shipment

The first known activity in this case occurred in December 1978, when the Fernandez group travelled from Miami, Florida, to a farm in Abita Springs, Louisiana, owned by Carnet. There Fernandez sold a marijuana shipment, supplied by Carnet, to Robert Govern, a major wholesale buyer. Morales and Prado participated in the weighing and loading of that marijuana. The Fernandez group later returned to their home base in Miami where Morales and Prado collected the balance of the money owed by Govern. Morales, in turn, delivered some of the money to Rabeiro for delivery to Carnet.

The Kountze Farm Shipment

In February 1979, Carnet purchased a farm near Kountze, Texas, to be used as a place in which to conceal the marijuana during the distribution process (known as

a "stash" site). Later that month, the Fernandez group travelled to Beaumont, Texas, to await the arrival of one of Carnet's shipments. When the marijuana arrived, the Fernandez group met Carnet. Rabeiro and others at the Kountze farm. This load was sold to Govern. The Fernandez group later returned to Miami, where Prado and Morales collected payment from Govern and passed some of that payment to Rabeiro for Carnet.

The Rice Silo Farm Shipment

After the Kountze Farm transaction, Fernandez decided to become a smuggler as well as a broker. To that end Fernandez formed a partnership with Armando Lopez of Houston, Texas, who had represented that he could transport the marijuana from the mother ship to shore and then to a point inland. The Fernandez group travelled to Houston to meet Lopez and Cary to discuss the proposed smuggling operation.

While those discussions were taking place, Carnet informed Fernandez of the expected arrival of another shipment. In preparation, the Fernandez group, along with Lopez, travelled to Beaumont to select a suitable stash site. Unable to find a site, the Fernandez group and Lopez returned to Houston to consult with Doyle, a major buyer. After the meeting Morales accompanied Doyle to inspect a prospective stash site, a farm in LaBelle, Texas, known as the Rice Silo Farm. About a week later, in late April or early May 1979, Carnet notified Fernandez of the precise arrival time of the new shipment. The Fernandez group, Doyle and Mitchell, another major buyer, then travelled from Houston to the Rice Silo Farm. Carnet and Rabeiro arrived to meet the others at the farm shortly after the arrival of the trucks carrying the marijuana.

Because of a disagreement among some of the defendants, however, the marijuana was reloaded and driven to Abita Springs, Louisiana. There the Fernandez group, along with Rabeiro, weighed the marijuana and left it to be divided between Mitchell and Doyle.

The JANICE Shipments

In the meantime, another marijuana shipment had reached the Gulf of Mexico. Fernandez and Lopez functioned both as smugglers and brokers on this shipment. Anticipating the shipment's arrival, the Fernandez group travelled from Miami to Houston where they waited at Lopez's house until Lopez's crew unloaded the marijuana from the M/V JANICE to trucks on shore. The marijuana was delivered to a stash house on Highway 45, north of Houston in late May 1979. Lopez and the Fernandez group split the first delivery between the buyers Govern and Mitchell. Approximately two nights later, Lopez's offloaders transferred the remaining marijuana from the mother ship to the M/V JANICE. The JANICE and marijuana, however, were seized in the early morning hours of May 29, after the vessel ran aground just offshore.

The Jasper Farm Shipments

In August 1979, an associate of Govern purchased a farm near Jasper, Texas, to use as a stash site. At the beginning of September of that same year the Fernandez group inspected the Jasper farm, and, with the assistance of others, moved trucks, cars, scales, and communications equipment onto the farm. At this point, Prado had been replaced in the Fernandez group by Ruben Perez. In preparation for the next shipment, the Fernandez group

established headquarters in a house in Houston, and set up radio communications on a farm on the outskirts of town. The next marijuana shipment, furnished by the Cotes brothers, arrived on or about December 4, 1979. Fernandez and Lopez functioned both as brokers and smugglers on this load. About 8,000 pounds of marijuana was delivered to the Jasper farm on the first night, and the rest of the shipment was successfully offloaded and delivered the following night. Morales and Perez assisted in weighing and distributing the 48,000-pound load. Govern was the major buyer. After the load was distributed, the Fernandez group returned to Houston where Govern paid them between $2 million and $2.5 million.

On December 19, 1979, Carnet imported about ten tons of marijuana and transported it to the Jasper farm. The Fernandez group and Lopez received word that the shipment had arrived and went to the Jasper farm where they met Carnet, Rabeiro and others. The load was weighed and distributed to Mitchell. Following the transaction, the Fernandez group travelled to Miami. In Miami, Morales and Perez collected cash payments from Govern, Doyle and Mitchell. By January 1980, Perez had collected $2 to $2.5 million from Mitchell, about one-half Mitchell's debt for the December 19 load. Perez later made two payments of about $600,000 each to Rabeiro for Carnet.

On or about January 14, 1980, Perez, Morales, and Lopez travelled from Miami to Houston. A shipment from the Cotes brothers arrived on January 15 or 16. On the first two nights, however, those on shore lost contact with the boats. In the early morning hours of January 22, the third night of the operation, a local sheriff arrested Lopez and some of the others. Lopez was later released.

After that failed attempt, Perez and Morales went back to Miami where they collected payment for previous shipments from Govern and Mitchell. Between December 1979, and early February 1980, Perez's collection for prior shipments totalled $15 million to $20 million in cash. On two occasions thereafter, Perez delivered money to Rabeiro for Carnet.

In early February 1980, Perez and Morales met some of Carnet's associates in Houston to discuss the arrival of a new shipment from Carnet. The shipment was delivered, and Perez, Morales, and Rabeiro weighed and distributed this marijuana shipment at the Jasper Farm. The major buyers were Mitchell, Doyle and Govern. Once Doyle received his portion, Morales and Perez travelled to Houston to collect payment from Govern, and then to Beaumont where they collected from $90,000 to $100,000 from Doyle. Perez and Morales later travelled to Miami where they collected payment of between $12 million and $15 million from Mitchell, Doyle and Govern for the previous two shipments.

In April 1980, Morales and Perez, with Fernandez's financial support, sought to become smugglers themselves. To effect their plans, they travelled to New Orleans to meet with certain persons who were to provide offloading services. Unknown to Morales and Perez, the people they met in New Orleans were undercover agents from the Drug Enforcement Agency (DEA). As a result of their communications with the DEA agents, the coast guard seized three boatloads of marijuana belonging to the Fernandez group between May and August of 1980. On October 28, 1980, Morales introduced Fernandez to the DEA agents in New Orleans. After further dealings with

the agents, Morales, Perez and Fernandez were arrested in March 1981.

The defendants were tried before a jury in district court. Mitchell, Doyle, Prado and Rabeiro were convicted on one count of conducting the affairs of an enterprise through a pattren of racketeering activity, and one count of conspiring to commit that offense. 18 U.S.C. § 1962 (c), (d). All defendants were convicted on one count of conspiring to possess marijuana with the intent to distribute, and one count of conspiring to import marijuana. 21 U.S.C. §§ 846 and 963. Mitchell and Rabeiro were convicted on three counts, and Prado and Doyle on two counts of distributing and possessing marijuana with the intent to distribute and aiding and abetting that offense. 21 U.S.C. § 841(a)(1). Rabeiro was convicted on four counts, Mitchell on three counts, and Prado and Doyle on two counts each of importing marijuana and aiding and abetting that offense. 21 U.S.C. § 952; 18 U.S.C. § 2. Finally, Mitchell, Doyle, Prado and Rabeiro were convicted of one count of interstate travel to promote the importation and possession of marijuana. 18 U.S.C. § 1952 (hereafter referred to as the Travel Act). Mitchell, Doyle, Prado and Rabeiro were sentenced to twenty years imprisonment and fined $90,000 each. Cary was sentenced to five years imprisonment.

II

All defendants contend the district court abused its discretion in failing to grant their motions for continuance both before and during trial. The essence of the defendants' argument is that because of the nature and complexity of the case, and the short length of time between

their indictment and the trial date, they were unable to prepare for trial adequately.[1]

The facts underlying the defendants' claim of prejudice are not in dispute. On August 8, the government made available to all defendants the documents it proposed to introduce at trial. Because of this proffer, the court denied all of the defendants' discovery motions. On August 26, the government made a second proffer of exhibits not revealed on August 8, and, at that time notified the defendants of the trial testimony of certain prospective witnesses that was given in other cases. On September 1, the government sent the defendants information concerning expected scientific and expert testimony. The defendants, however, argue that they did not receive it in time to prepare propely. The govenment also agreed to turn over all Jencks Act and *Gigilio* material to the defendants twenty-four hours prior to trial, but the defendants contend that some of it never arrived, and some of it was made available only as each witness testified or when the defendants discovered that it existed.

We consider these arguments in the light of the well settled rule that the disposition of motions for continuance is vested in the sound discretion of the trial court, which will not be disturbed on appeal except upon a clear

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1. The following table indicates the filing date of the defendants' motions and the date of denial by the district couurt:

	Motion Filed	Motion Denied
Prado	August 11	August 22
Mitchell	August 15	September 7
Rabeiro	August 22	September 8
Cary	August 26	September 8
Doyle	September 1	September 8

Beginning September 6 through September 22, all defendants joined in filing a total of seven motions for continuance, all of which were denied by the district court at various times throughout the trial.

showing of abuse of discretion. Whether an abuse of discretion has occurred is to be decided on a case-by-case basis in the light of all the circumstances. *United States v. Barrantine*, 591 F.2d 1069, 1074 (5th Cir. 1979). In addition, a defendant can obtain reversal only by demonstrating serious prejudice. *United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1565 (1985).

[1] At the conclusion of trial, the district court found no disadvantage to the defendants, observing that all defense counsel had been well prepared to try the case. After carefully reviewing the record, we agree with the district court's conclusion. All defendants had over forty days from the time of their arraignment to prepare for trial. Although the government provided a large amount of Jencks Act and *Brady* materials the day before trial, and other such materials during trial, there has been no showing that the defendants failed to receive the materials in time to effectively cross-examine witnesses. In fact, defense counsel used the Jencks Act materials in cross-examining Morales, the first witness to directly implicate any defendant in any criminal activity.

Although the government did not produce certain requested video and audio tapes for the defendants' use until midway through the trial, the first request for production of those tapes was made on the day before trial. Thus, under the circumstances, the government's production was timely. Moreover, the court postponed Morales' cross-examination to give defense counsel an opportunity to review the various recordings.

We also find that the government was excused for failing to provide, prior to trial, the sentencing reduction

materials concerning the government witnesses Morales, Perez and Patterson, defendants who had pled guilty and testified for the government. Those materials were not under the prosecution's control, but were sealed by order of other federal courts. When the documents were released they were made available to the defendants in time for use in cross-examination. Under the totality of the circumstances, we are persuaded that the defendants suffered no prejudice from the denial of their continuance motions and therefore hold that the district court did not abuse its discretion in its ruling.

III

Mitchell contends that the district court erred in denying his motion for continuance because his counsel had a scheduling conflict, thus leaving him without representation at trial. The district court, in a thorough and fully-considered opinion, set forth the facts underlying Mitchell's argument. *United States v. Fernandez*, 576 F. Supp. 397, 399-400 (E.D. Tex. 1983). We will briefly summarize the relevant facts here. On July 12, 1983, the case was set for trial. Mitchell appeared before a magistrate on July 26 and 28, but arraignment was postponed on both days because Mitchell had not yet retained an attorney. On July 29, Mitchell again appeared before the magistrate, and at that time an attorney, Kent Schaffer, advised the court that although he had not been retained, he expected to come to an agreement with Mitchell by that weekend. Arraignment was again rescheduled, and on August 1, Schaffer appeared at Mitchell's arraignment as Mitchell's attorney. The September 7 trial date was given to Schaffer on August 1, yet he did not inform the court of the known conflict. On August 15, Schaffer filed

a motion for continuance because he was scheduled for trial in another federal district court on September 7, a fact he had known since June 13. A federal magistrate denied Mitchell's motion on August 25. The district court denied Mitchell's renewed motion for continuance on September 7, and Mitchell began trial without the presence of an attorney on September 27, after again protesting the fact that the trial was not to be delayed so that Schaffer could represent him. Mitchell was not represented by counsel until sentencing.

[2] It is a fundamental principle of due process that a defendant be afforded a reasonable opportunity to be represented by chosen counsel. An accused, however, is entitled only to a *fair or reasonable* opportunity to obtain particular counsel. *Gandy v. State of Alabama,* 569 F.2d 1318 (5th Cir. 1978) (emphasis added). The *Gandy* court explained:

> [T]he right to counsel of one's choice is not absolute as is the right to the assistance of counsel. The right to choose counsel may not be subverted to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. It is a right and a proper tool of the defendant; it cannot be used merely as a manipulative monkey wrench. A defendant cannot assume that the right to choose counsel affords "the right to obtain a delay at his whim and caprice, or to obtain a reversal because he was unable to frustrate justice." Rather, the proper exercise of the trial court's discretion requires a delicate balance between the defendant's due process right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice. 569 F.2d at 1323 (citations and footnotes omitted).

[3] In determining what was "fair and reasonable," the district court considered certain factors set forth in *Gandy*[2] and made the following findings of fact: (1) the delay would have been several months considering the projected length of Schaffer's previous commitment; (2) Schaffer had no associates, but a lawyer who shared office space with him represented two of the other defendants (and presumably could have represented Mitchell); (3) no other continuances were granted; (4) the trial date was set well in advance so that all attorneys, witnesses and the court could be present; (5) Mitchell had knowledge of his attorney's conflict near the time of arraignment; (6) Mitchell and Schaffer requested the continuance in bad faith for the purpose of delay; (7) Mitchell had a one-month opportunity to retain other counsel; and (8) Mitchell attempted to manipulate the court's schedule by retaining an attorney whom he knew to have a conflict. 576 F. Supp. at 403.

In addition to considering the *Gandy* factors, the district court relied upon *United States v. Barrentine,* 591 F.2d 1069 (5th Cir. 1979), a factually similar case. In *Barrentine,* the defendants and their attorney were notified on October 12 of the October 31 trial date. They moved for a continuance on October 14 because of their attorney's conflicting schedule, but the court denied the

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2. In *Gandy,* we set forth the following factors to aid the district court in determining whether a continuance should be granted to enable a defendant to have counsel of his choice: (1) the length of the requested delay; (2) whether the lead counsel has an associate who is adequately prepared to try the case; (3) whether other continuances have been requested and granted; (4) the balanced convenience or inconvenience to litigants, witnesses, opposing counsel and the court; (5) whether the requested delay is for a legitimate reason or whether it is dilatory and contrived; and (6) whether there are other unique factors present. 569 F.2d at 1324.

motion on October 18. The defendants and their attorney were informed that under no circumstances would the court delay the trial. On the first day of trial, a partner in the defendants' attorney's firm renewed the motion for continuance. The court denied the motion and appointed the law partner to represent the defendants. *Id.* at 1073-75. We affirmed the district court's denial of the continuance, reasoning that the defendants made a calculated attempt to force a continuance by retaining a particular attorney, notwithstanding their knowledge of the court's resolve not to delay the trial. *Id.* at 1075. As in *Barrentine*, Schaffer unquestionably knew of his conflict on the day he was retained as Mitchell's attorney. Neither Schaffer nor Mitchell mentioned the possibility of a conflict until Schaffer moved for a continuance two weeks later. Although an accused must be afforded a reasonable opportunity to employ and consult with counsel, the Constitution does not give him the power to manipulate his choice of counsel to delay the orderly progress of his case. *Gandy*, 569 F.2d at 1323. Under the circumstances of this case, the district court's finding cannot be overturned and thus it did not abuse its discretion in denying Mitchell's continuance motion.

[4] There is no abuse of discretion even though the denial of the continuance resulted in Mitchell's being unrepresented throughout the trial. The trial date, September 7, was set on July 12. Mitchell and his counsel were present on or before July 29 when other defendants were told that the trial was set for Septmber 7. Since ... ne 13, Mitchell's counsel had been aware of the trial date that presented a conflict. Yet Mitchell employed Schaffer, knowing that Schaffer had a conflict. Still, there was no motion for a continuance until August 15. Even though

Mitchell purported to make some last-minute efforts to secure counsel the day before trial, the court found that his seeking a continuance was in bad faith and for the purpose of manipulating the court's schedule. This finding was based on Mitchell's failure to attempt to hire another attorney for more than one month, and his continued insistence that Schaffer, and only Schaffer, represent him. Moreover, the court noted that there were other attorneys sharing offices with Schaffer who possibly could have handled the case; indeed, one of the attorneys sharing office space with Schaffer was involved in the case, representing another defendant. As we have noted, the district court specifically found that Mitchell and Schaffer requested the continuance in bad faith and for the purpose of delay, and that Mitchell attempted to manipulate the court's schedule by retaining an attorney he knew to have a conflict. The evidentiary record reflecting the course of conduct of Mitchell and Schaffer, though perhaps subject to another interpretation, fully supports the conclusion that the district court reached.

[5] We have held before, and so hold again today, that failure to secure counsel under such circumstances operates as a waiver of one's right to counsel. In *United States v. Terry,* 449 F.2d 727 (5th Cir. 1971), we upheld the conviction of a defendant who was not represented throughout his trial where the defendant failed to secure counsel of his choice within a reasonable time. Similarly, we upheld the conviction of the defendant in *United States v. Casey,* 480 F.2d 151 (5th Cir. 1973), where the court denied a motion for continuance, and the defendant was forced to act as his own counsel. There we held that when insistence on the right to counsel of one's choice is used as a device to manipulate or subvert the orderly procedure of the court, the failure of

the defendant to retain an attorney on twenty days notice may be properly treated as a waiver of his right to counsel. And in *United States v. Fowler,* 605 F.2d 181 (5th Cir. 1979), we again noted that the grant or denial of a continuance rests in the broad discretion of the trial judge. The defendant there had been first arraigned in March. He had not hired an attorney by October 6, when he appeared before the court for a trial setting. The court set the trial for October 16. Fowler then attempted to hire counsel of his choice who was unavailable on such short notice. On October 12, Fowler moved for a continuance to allow his chosen attorney to represent him. The motion was denied, and the trial proceeded to conviction with Fowler representing himself. In holding that the district court had not abused its discretion in denying the continuance, we noted that no matter how fundamental the right to counsel may be, it may not be used as a means of delaying or trifling with the court. *Id.* at 183.

Thus, our holding today continues this line of precedent that motions for continuance are within the sound discretion of the district court. Mitchell had the fundamental right to a reasonable opportunity to obtain a particular counsel of his choice. That reasonable opportunity was afforded Mitchell in this case. Mitchell did not have the right to continue to insist on a particular lawyer and postpone the trial indefinitely, at the expense of the court, its schedule, the government, the other parties, and the orderly administration of justice. The district court is therefore affirmed in its denial of Mitchell's motion for continuance.

IV

The defendants Prado, Rabeiro, Doyle and Mitchell argue that the government failed to define adequately the

alleged "enterprise" in the substantive RICO count of the indictment. 18 U.S.C. § 1962(c). Additionally, Prado, Rabeiro and Doyle argue that the government's proof failed to show a single RICO conspiracy as required by 18 U.S.C. § 1962(d), but rather showed multiple conspiracies. Before addressing these arguments, we consider the necessary elements to prove the respective RICO violations.

[6] To establish a section 1962(c) violation, the government must prove the existence of an enterprise, the defendant's employment by or association with that enterprise, and the defendant's conduct of or participation in the conduct of the enterprise's affairs through a pattern of racketeering activity. *United States v. Cauble,* 706 F.2d 1322, 1331 (5th Cir. 1983); *United States v. Phillips,* 664 F.2d 971, 1011 (5th Cir. 1981). The "enterprise" is not synonymous with the "pattern of racketeering activity," but is an entity separate and apart from the pattern of activity in which it engages. Thus, in every case the government must prove not only that there was a pattern of racketeering activity, but that it was conducted through a defined enterprise. *Cauble,* 706 F.2d at 1331. Section 1962(d) makes it illegal to conspire to violate the above-described substantive provision of RICO. Both section 1962(d) and section 1962(c) require that the enterprise affect interstate commerce. *Cauble,* 706 F.2d at 1331.

A.

[7] With the elements of sections 1962(c) and (d) in mind, we examine the sufficiency of the indictment. The purpose of an indictment, of course, is to inform the accused of the charges against him. An indictment

is sufficient if it contains the elements of the offenses charged, fairly informs the defendant of the charges he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions for the same offense. *Cauble,* 706 F.2d at 1333; *United States v. Stratton,* 649 F.2d 1066, 1073 (5th Cir. 1981). Here the substantive RICO count defined the enterprise as "a group of individuals associated in fact, to promote and facilitate the illegal importation and smuggling of multi-ton quantities of marijuana * * * into the United States from places outside the United States, and the distribution of said marijuana." The RICO count delineated fourteen acts of racketeering activity by date, specified the participants involved by name, and laid out the elements of the offense. It is clear that the defendants received adequate notice of the charges against them and are able to plead their convictions in bar of future prosecutions for the same offense. The substantive RICO count thus adequately defined the "enterprise" involved.

For the same reasons as those expressed above, we also reject the defendants' argument that the district court abused its discretion in denying the defendants' motions for discovery and a bill of particulars to clarify the "enterprise" alleged in the indictment. Since we have concluded that the "enterprise" was adequately defined, no further clarification was required. We hold that the district court did not abuse its discretion in refusing to order discovery or a bill of particulars.

B.

[8] Prado, Rabeiro, and Doyle also argue that there was a fatal variance between the "enterprise" alleged in the indictment, and the numerous "enterprises" established

at trial. In essence, the defendants argue that, because each of the parties in each of the transactions was not identical, each marijuana shipment represented a different and distinct conspiracy rather than the single RICO conspiracy alleged in the indictment. For support, the defendants rely primarily on our decision in *United States v. Sutherland,* 656 F.2d 1181 (5th Cir. 1981). In *Sutherland,* the indictment alleged a conspiracy between a municipal court judge and two others who were to collect traffic tickets from their friends and associates and deliver them to the judge for a favorable disposition. The money collected would, in each case, be divided between the judge and the defendant who collected and delivered the tickets. Although the indictment framed the conspiracy as a single agreement among all three defendants, the government failed to prove any agreement or association between the two defendants who were to collect and deliver the traffic tickets. *Id.* at 1186. Since there was no proof that the two defendants agreed with each other to participate with the judge, nor was the nature of the activity such that each defendant must necessarily have known that others were also involved in the conspiracy with the judge, the court held that the two separate conspiracies could not be tried jointly on a single RICO conspiracy count. *Id.* at 1194.

In reaching its decision, however, the *Sutherland* court observed that the government need not always demonstrate an actual agreement amount the various conspirators, or even actual knowledge of each other to establish a single conspiracy. *Id.* at 1190. In some cases the interdependent nature of the criminal enterprise is such that each conspirator had to have realized that the conspiracy extended beyond his individual role. Each individual in

this chain-type conspiracy knows that the success of the conspiracy requires an organization wider than may be disclosed by his personal participation. *Id.* at 1191; *United States v. Elliott,* 571 F.2d 880, 901 (5th Cir. 1978). Conspiracies to distribute narcotics, such as the one here, have generally been considered to be a prime example of a chain or interconnected conspiracy in which a participant in a segment of the conspiracy may be convicted of participation in the whole. *United States v. Michelena-Orovio,* 719 F.2d 738. 746 (5th Cir. 1983) (en banc).

The scope of a conspiracy is judged by five factors:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

United States v. Marable, 578 F.2d 151, 154 (5th Cir. 1978).

Unlike *Sutherland,* there was not an impermissible variance in this case between the proof at trial and the enterprise alleged in the indictment, because each of these factors points toward a single RICO conspiracy. There is similarity of time, persons, offenses, places overt acts among the shipments.

The Fernandez group, occasionally joined by Lopez functioned as a broker on every shipment. The smuggler's role was filled either by Jesus Carnet and his organization, or by the Fernandez-Lopez partnership. The major buyers on each occasion consisted of Govern, Doyle and Mitchell,

either singly or in combination. With the exception of two loads, which were supplied respectively by Jose Segura and a group known as the Ruffin brothers, all shipments were supplied either by the Cotes brothers or Carnet. Even a cursory review of the facts reveals that most of the defendants were aware of and in fact participated with the other defendants at some point in the many transactions that took place between 1978 and 1980. In short, the unified purposes of the conspiracy to violate drug and antiracketeering laws, the interconnections among the parties and events, the nature of the statutory offenses charged, the unity of the time period in which the conspiracy was proved to have occurred, the similarity of the places where the conspiracy and overt acts occurred, and the scope of the criminal offense which the government sought to punish lead to the inescapable conclusion that a single conspiracy was alleged and proved.

The above analysis applies as well to the defendant's argument that the government proved multiple conspiracies instead of the single conspiracy described in the two counts charging conspiracy to import marijuana and conspiracy to possess marijuana with the intent to distribute. As shown above, each defendant knew that his actions were linked to a continuous scheme and that the success of the operation depended upon the fulfillment of each defendant's particular duty. *See Michelena-Orovio,* 719 F.2d at 746-47. There simply was not an impermissible variance between the conspiracy alleged in the indictment and that proved at trial.[3]

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3. Because the government established a single conspiracy, we also hold that the district court did not err in refusing to grant the defendants' pretrial and mid-trial motions for severance. The granting of a severance under Fed. R. Crim. P. 14 rests in the sound discretion of the district court and reversal is not required except upon

V

All defendants, except Mitchell, challenge the sufficiency of the evidence to support their convictions on various counts of the indictment. Before addressing these issues, it is appropriate here to set forth our familiar standard of review. In reviewing the sufficiency of the evidence in a criminal case the question is whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *United States v. Michelena-Orovio,* 719 F.2d 738, 742 (5th Cir. 1983). In considering whether the jury could have found the defendants guilty beyond a reasonable doubt, we must consider the evidence in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L.Ed 680 (1942); *Michelena-Orovio,* 719 F.2d at 742. Because of the many defendants and charges involved, we will examine the evidence against each defendant separately.

A.

Prado. [9] Prado challenges the sufficiency of the evidence to support his conviction on the RICO substantive and conspiracy counts, two importation counts, one importation conspiracy count, and one Travel Act count. In the substantive RICO count, Prado was charged with five racketeering acts consisting of one count of violating the Travel Act, two counts of importation, and two counts of distribution. Those racketeering acts concerned his par-

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a showing of "specific and compelling" prejudice. *United States v. Terrell,* 754 F.2d 1139, 1150 (5th Cir. 1985). The same evidence admitted at trial would have been admissible in a separate trial to prove the existence and scope of the RICO and narcotics conspiracies. The district court thus did not abuse its discretion in refusing to grant the severance motions.

ticipation in the Kountze and Rice Silo Farm shipments, the December 1978 Abita Springs shipment, and the two JANICE shipments in May 1979.

The evidence was clearly sufficient to support Prado's conviction on the underlying racketeering counts. Prado participated with representatives of both the broker and smugglers in the weighing and distribution of the marijuana, collected money from the major buyers, and made payments to Rabeiro for Carnet, the supplier, on several occasions. Prado's knowledge of the origin of the shipments is also indicated by his trusted position and the large quantities of marijuana involved. *See Michelena-Orovio,* 719 F.2d at 752. The evidence is more than sufficient to support Prado's conviction on the importation conspiracy, importation and distribution counts.

Prado's major argument concerning the sufficiency of the evidence under the substantive RICO count is that the defendants did not cooperate for the advancement of the enterprise. To the contrary, as we have previously mentioned, the evidence clearly reveals that the defendants did cooperate in the function of the enterprise, and that cooperation was essential to its success. Prado's challenge of the evidence under the RICO conspiracy count is that most of the evidence concerned activities occurring after he stopped working for the Fernandez group. Although Prado may not have been a part of the conspiracy from beginning to end, the evidence was sufficient to establish his activity in, and complicity with, the conspiracy. We also note that the district court expressly instructed the jury to consider Prado's claim of early withdrawal from the conspiracy.

In regard to the Travel Act count, the evidence showed that Prado travelled from Texas to Abita Springs, Louisi-

ana, to weigh the Rice Silo Farm load. Because the jury convicted him on the distribution count arising from that shipment, the jury also could have reasonably inferred that his interstate travel aided the marijuana importation and distribution.

B.

Doyle. [10] Doyle argues that his conviction on the distribution conspiracy and importation conspiracy counts must be reversed because the evidence showed that he engaged only in a buyer-seller relationship by purchasing marijuana on occasion. Although Doyle acted only as a major buyer in the operation, his continuing relationship with the other defendants and the sizes of the caches involved establishes his role in the conspiracy to import and distribute marijuana. *See Mechelena-Orovio,* 719 F.2d at 752. In addition, Doyle aided the importation of marijuana by assisting Morales in securing the Rice Silo Farm stash house, and by having one of his employees drive a truckload of marijuana from the farm to Abita Springs, Louisiana. Since the importation was not complete until the marijuana reached its final destination, Doyle aided the importation of marijuana to Texas and Louisiana. *See United States v. Phillips,* 664 F.2d 971, 1031 (5th Cir. 1981).

The evidence also was sufficient to support Doyle's conviction under the Travel Act. Doyle's assistance in transporting the Rice Silo Farm shipment from Texas to Louisiana where the shipment was weighed and distributed clearly aided the importation, possession and distribution of marijuana. *Cf. United States v. Garrett,* 716 F.2d 257, 266-67 (5th Cir. 1983) (interstate telephone call was sufficient to facilitate bribery activity and thus support a Travel Act conviction).

Doyle also challenges his conviction for aiding and abetting the importation of the Jasper farm load on the grounds that he did not know that the Jasper farm load was imported. Since Doyle had a continuing relationship with the other defendants as a major buyer, and considering the quantity of marijuana involved, the jury could have reasonably inferred that he was aware that the Jasper farm load was imported. *See Michelena-Orovio,* 719 F.2d at 752.

C.

Rabeiro. [11] Rabeiro challenges his conviction on four importation counts, and the Travel Act count. Rabeiro argues that he participated only in transporting the marijuana shipments once they were in the United States and that there was no evidence that he knew of the marijuana's origin. To the contrary, there was sufficient evidence to establish Rabeiro's knowledge and complicity in the marijuana's importation. Rabeiro played a key role in the Carnet organization, the importing source of the marijuana, by participating in the weighing and distributing of marijuana and by collecting multimillion dollar payments on Carnet's behalf. The evidence also showed that he was present at the various points on the Texas coast (known as the "hole") to receive the marijuana and transport it inland. The jury could have reasonably inferred that he saw the boats bringing in the marijuana. Also, it was undisputed that the marijuana imported by Carnet came from Colombia and that others in the Carnet organization knew of its origin. Thus the jury could have reasonably concluded that Rabeiro, associated as he was with the Carnet organization, also was aware of the marijuana's origin.

The evidence was also sufficient to support Rabeiro's conviction under the Travel Act. Rabeiro was present at the Rice Silo Farm when a shipment was delivered there in April or May 1979. Morales testified that Rabeiro was one of the members of the Carnet organization who helped weigh the marijuana shipment after it had been transported to Abita Springs, Louisiana. Thus, the jury could have concluded that Rabeiro's interstate travel from Texas to Louisiana aided the marijuana importation and distribution. *See Garrett,* 716 F.2d at 266-67.

D.

Cary. [12] Cary contends that the evidence showed only that he was in the company of certain conspirators, but there was no proof that he joined in the conspiracy to import or distribute marijuana. The government concedes that there is little direct evidence to connect Cary to the conspiracy, but argues that the evidence is still sufficient to uphold the jury verdict. Although the evidence concerning Cary's participation in the conspiracy was indeed circumstantial, we hold that it was nevertheless sufficient to sustain his conviction. Cary made a $1,000 earnest money payment for the purchase of the M/V JANICE, and later arranged and paid for several repairs on the JANICE in May of 1979. Cary even paid overtime rates on May 22 to have a navigational aid on the JANICE repaired immediately rather than wait until the next day. Within days, the JANICE was used to transfer 30,000 pounds of marijuana from a mother ship to shore. Cary's connection with the vessel was also established by evidence that defendant Tarlo chartered the JANICE for one month beginning after the vessel was repaired.

More incriminating evidence, perhaps, is that Morales and Lopez discussed the intended use of the JANICE in

Cary's presence and that Cary remained silent and did not deny his role in the scheme. The jury could have inferred from Cary's silence, in the context of the other evidence, that he acquiesced in Lopez's description of his role. *See United States v. Caballero,* 712 F.2d 126, 130 & n.2 (5th Cir. 1983). In addition, there is evidence that Cary rented a house in Dickinson, Texas, where communications equipment, including a large radio antenna, was installed to communicate with the JANICE. Approximately 7,000 pounds of marijuana from the first JANICE shipment was sent to that house. When the owner returned to the house in July 1979, he found both the antenna and navigational charts inside. Although the owner of the house could not identify Cary in court, he did testify that Cary looked like the man with whom he had dealt. Moreover, a lease on the house signed by "Robert Cary" was admitted into evidence. The jury could have concluded, in the context of other evidence, that the defendant Robert Cary was the Robert Cary who signed the lease. Although there was no direct evidence to tie Cary to the conspiracy, considering all the evidence in the light most favorable to the government, a jury could have reasonably concluded that Cary was involved in the conspiracy as charged.

VI

[13] Doyle argues that the district court erred in denying his motion to dismiss the indictment because of prosecutorial misconduct. Doyle asserts that the government abused the grand jury process by having Perez and Morales appear before the grand jury and simply adopt relevant portions of a DEA report rather than present live testimony. Doyle also contends that the grand jurors

should have been told that both Morales and Perez were unable to identify a photograph of Doyle two days before their grand jury appearance.

The fifth amendment provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the grand jury." All that is constitutionally required of an indictment is that it be "returned by a legally constituted and unbiased jury." *United States v. Heffington,* 682 F.2d 1075, 1080 (5th Cir. 1982) (quoting *Costello v. United States,* 350 U.S. 359, 363, 76 S. Ct. 406, 409, 100 L.Ed. 397 (1956)).

Here, a magistrate found that in addition to presenting the DEA form, the prosecutor asked both Morales and Perez about their involvement in the scheme, the charges that had been brought against them, and the plea bargains into which they had entered. In addition, the grand jury asked Perez two questions, and both Morales and Perez were available for further questioning. The magistrate also found that it was irrelevant whether the prosecutors disclosed Morales' and Perez' inability to identify a photograph of Doyle, because the witnesses were not asked to identify Doyle before the grand jury. The magistrate concluded that, under these circumstances, the grand jury process was not abused. The district court after conducting a *de novo* review, adopted the magistrate's findings and recommendation that Doyle's motion be denied. After conducting our own review, we hold that the district court's findings are supported in the record and that Doyle did not meet his burden of proving that the grand jury's will was overborne.[4]

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4. The government also argues that since there was sufficient evidence to convict Doyle beyond a reasonable doubt, it follows that

VII

[14] The final issue we will address is Doyle's contention that his double jeopardy rights were violated by the court's imposition of consecutive instead of concurrent sentences on the marijuana conspiracy counts, 21 U.S.C. § 846 and the RICO conspiracy count, 18 U.S.C. § 1962(d).

In resolving this issue, we follow and adopt the analysis of the Second Circuit in *United States v. Thomas,* 757 F.2d 1359, 1370-71 (2d Cir. 1985). The *Thomas* court observed several factors that show that Congress intended to allow cumulation of punishment for violations of sections 1962(d) and 846. The legislative histories of section 1962(d) and section 846 reveal nothing concerning the relationship between the two sections. The court also noted that the two sections are in separate statutes and are intended to deter two different kinds of activity—racketeering on the one hand and narcotics violations on the other. Since each statute expressly authorizes punishment for violation of its conspiracy provision the inference is that Congress intended to authorize cumulative punishment. *Id.* at 1371.

In addition, as the Second Circuit noted, the provisions also meet the test set forth in *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932) for determining whether the offenses in question are in fact separate. Section 1962(d) requires proof of an "enterprise" engaged in a "pattern of racketeering activity, but section 846 does not. Section 846 requires

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there was probable cause to institute charges against him, and thus the abuse of the grand jury, if any, is immaterial because it merged into the final judgment of conviction. Because we find that the grand jury process was not abused, we do not address this question.

proof of a narcotics-related conspiracy. Section 1962(d), however, requires only proof of an agreement to commit a felony. Because each provision requires proof of a fact that the other does not, the *Blockburger* test is satisfied. *Thomas,* 757 F.2d at 1371. In conclusion, we hold that the district court did not err in imposing consecutive sentences on Doyle for his violation of sections 846 and 1962(d).

VIII

There are several remaining issues concerning certain evidentiary rulings of the district court and the propriety of certain comments made by the prosecutor in his rebuttal closing argument. Because these contentions are completely without merit it would serve no useful purpose to discuss them here. It is sufficient to say that we have carefully considered the defendants' remaining arguments, reviewed the record, and have examined the applicable law. We are not persuaded that any reversible error has occurred. In sum, the convictions of all the defendants are affirmed in all respects for the reasons expressed herein.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
AT NEW ORLEANS, LOUISIANA

NO. 83-2717

CRIMINAL APPEAL

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOSE' CARLOS PRADO,
Defendant-Appellant

Appeal From The United States District Court
For The Eastern District of Texas
Beaumont Division

PETITION FOR PANEL REHEARING ON BEHALF OF JOSE' CARLOS PRADO

Jimmy Phillips, Jr.
P. O. Drawer JJ
Angleton, Texas 77515

Attorney for Appellant

December 1985

CERTIFICATE OF INTEREST

The undersigned counsel of record for José Carlos Prado, certifies that the following listed party has an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal pursuant to Local Rule 13(a).

José Carlos Prado--Appellant

/s/ JIMMY PHILLIPS, JR.
Jimmy Phillips, Jr.
Attorney of Record for
José Carlos Prado

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
AT NEW ORLEANS, LOUISIANA

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PETITION FOR PANEL REHEARING ON BEHALF OF JOSE' CARLOS PRADO

To The Honorable United States Court of Appeals:

MOTION FOR REHEARING

I.

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, José Carlos Prado, the above named Appellant, respectively petitions the Court to grant a rehearing and reconsideration of the appeal in the above entitled cause. In support of this petition, the Appellant would show the Court as follows:

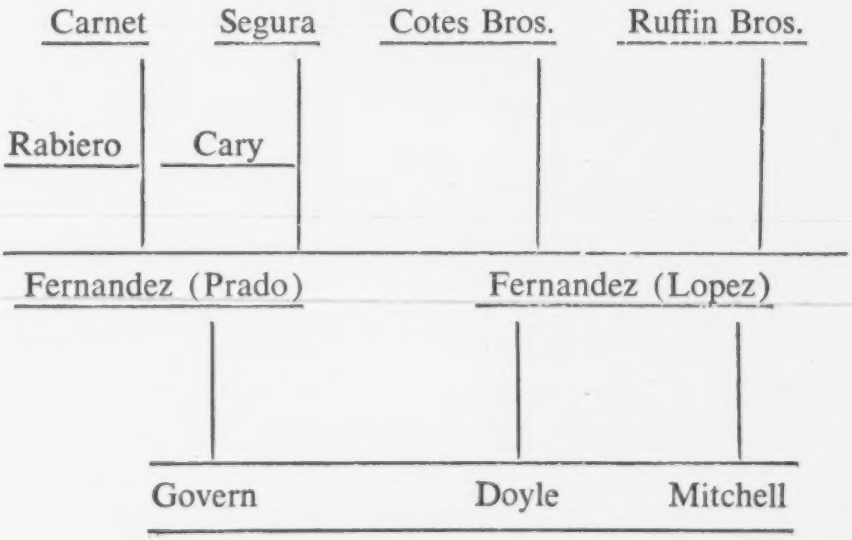
1.

RICO AND THE CONSPIRACIES

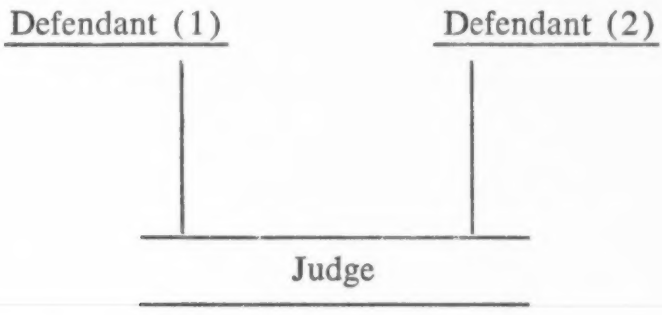
In overruling Points of Error Numbered 6, 9, 11, and 12, the Court failed to properly classify the groups and shipments, calling all persons involved one "enterprise". By doing so, the Court has indicated that so long as the Government alleges the "enterprise" as a general violation of the criminal narcotic laws, that any persons named and tried will be properly convicted as long as *those persons,* tried together, are related *to each other* without regard to allegation of the *constitution of the group* in the indictment, and the fact that the indictment alleges a relationship which cannot be proved.

For instance, this Court found that each single shipment was not a separate conspiracy, but failed to address the issue that the *Four Groups* of shipments were not separate conspiracies, i.e. (1) CARNET; (2) SEGURA; (3) COTES-BROTHERS; and (4) RUFIN BROTHERS.

The diagram below illustrates the independence of the four (4) groups of shipments.



This Court commented during oral argument that Fernandez was the common thread. That is true as to him and the groups below him. Had the Government alleged Fernandez and his buyers as the "enterprise" then this Court would be correct. Likewise, had the Government alleged the Carnet chain *or* the Segura chain as the "enterprise", then this Court would have been correct. However, there is no relationship between the Defendant, Rabeiro, and the Defendant Cary. Had the Government alleged the Carnet chain then Cary could not have been convicted. Had the Government alleged the Segura chain then Rabeiro could not have been convicted. If the Government had alleged the Cotes-Brother chain then neither Cary, Rabeiro, nor Prado could have been convicted. The case is similar to the situation in *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981). See diagram below:



Furthermore, the five point test set forth in *United States v. Michelena-Orovio,* 719 F.2d 738, 746 (5th Cir. 1983) (en banc) has not been met.

1. The groups and shipments were not similar in time.
2. The persons acting as co-conspirators above the Fernandez position of the chain was different for each of the four groups.
3. The overt acts were different for each of the groups.
4. The places where the conspiracy took place was different for each of the groups of shipment, unless one would generalize and say that all shipments were delivered into the United States.
5. However, the statutory offenses alleged were the same.

The proof of the Government therefore does not allege a single conspiracy nor a single "enterprise".

2.

EFFECTIVE ASSISTANCE OF COUNSEL

This Court failed in its opinion to address the issues raised by the Appellant, Prado, concerning the failure of the trial court to allow the Appellant to present evidence in his defense to the charges against him, thereby denying him effective assistance of counsel.

WHEREFORE, PREMISES CONSIDERED, your Appellant, Jose Carlos Prado, prays that a rehearing of the appeal in the above entitled cause be granted, and that the relief requested in his Appellant's Brief be granted.

Respectfully submitted this
6th day of December, 1985.

/s/ JIMMY PHILLIPS, JR.
Jimmy Phillips, Jr.
Attorney for Appellant
José Carlos Prado
P. O. Drawer JJ
Angleton, Texas 77515
AC 409 849-8511 (Angleton)
AC 713 482-7507 (Houston)
Bar Card #15953000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellant's Petition for Panel Rehearing was mailed to all interested parties this 6th day of December, 1985.

/s/ JIMMY PHILLIPS, JR.
Jimmy Phillips, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-2717

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID BRYDIE MITCHELL, JOSE CARLOS PRADO, REINALDO RABEIRO, ROBERT WEBSTER CARY, III and JOHN DOYLE
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITIONS FOR REHEARING

(January 2, 1986)

Before REAVLEY, and JOLLY, Circuit Judges, and MAHON,* District Judge.

PER CURIAM:

IT IS ORDERED that the petitions of MITCHELL, PRADO, RABEIRO & CARY for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

By: /s/ E. GRADY JOLLY
United States Circuit Judge

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* District Judge of the Northern District of Texas, sitting by designation.

APPENDIX B

UNITED STATES CONSTITUTION

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confrontd with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES STATUTES

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punisable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punisahble as a principal.

18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

* * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and therafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

* * *

18 U.S.C. § 1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

* * *

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * *

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

* * *

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848. Continuing criminal enterprise Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

* * *

21 U.S.C. § 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substances in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe, except that if a non-narcotic controlled substance in schedule III, IV, or V is also listed in schedule I or II of the Convention on Psychotropic Substances it shall be imported pursuant to such import permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.

Coca leaves

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

* * *

21 U.S.C. § 960. Prohibited acts A

Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

* * *

shall be punished as provided in subsection (b) of this section.

* * *

21 U.S.C. § 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX C

Court Charge Book

DEFINITIONS

AIDING AND ABETTING—the guilt of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise. So, if the acts or conduct of any person are willfully directed or authorized by the defendant, or if the defendant aids and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though he has committed the acts or engaged in such conduct himself.

CONSPIRACY—is a combination or agreement of two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or disregard the law.

CONTINUING—requires that the course of the purported illegal activity spans a definite period of time.

BUSINESS ENTERPRISE—(as used in Title 18, United States Code, Section 1952; Count 15) it is not necessary that the alleged activity be engaged in for any

particular length of time, nor must it be proved that such activity constituted the primary pursuit or occupation of the accused or that it actually returned a profit. What must be proved beyond a reasonable doubt is that the defendants, John Doyle, David Brydie Mitchell, Jose Carlos Prado, and Reinaldo Rabeiro engaged in a continuous course of conduct or series of transactions for profit rather than casual, sporadic or isolated activity.

ENTERPRISE—includes any individual, partnership, corporation, association, or other legal entity and any group of individuals associated in fact although not a legal entity. The "enterprise" charged in this case in Counts 1 and 2 is an "enterprise" consisting of a group of individuals associated in fact although not a legal entity.

INCOME—money or other material resources or property received or gained directly from the alleged dangerous drug transactions alleged. You should construe the phrase "substantial income" in an objective manner.

IMPORT—the bringing in or introduction of an article into the United States.

INTERSTATE COMMERCE—is commerce between the several states. FOREIGN COMMERCE is commerce between the United States and foreign nations. The government is not required to show any particular degree of effect on interstate or foreign commerce.

KNOWINGLY—doing an act which the law forbids, or knowingly failing to do an act which the law requires to be done, intending with bad purpose either to disobey or to disregard the law, may be found to have acted with specific intent. An act or a failure to act is "knowingly" done if done voluntarily and intentionally, and not because of a mistake or accident or other innocent reason.

MARIHUANA—Schedule I, non-narcotic controlled substance.

PATTERN OF RACKETEERING ACTIVITY—requires proof beyond a reasonable doubt of at least two of the acts of racketeering activity, alleged in the indictment. The two acts of racketeering activity must be within ten years of each other, one of which must have occurred after October 15, 1970. You must be unanimous on finding these two acts of racketeering activity. If you are not unanimous in finding beyond a reasonable doubt that the defendant under consideration committed at least two acts of racketeering activity, you must find him not guilty on Counts 1 and 2.

POSSESSION WITH INTENT TO DISTRIBUTE—to possess with intent to deliver or transfer possession of a controlled substance to some other person with or without any financial interest in the transaction.

The law recognizes two kinds of possession, "actual possession" and "constructive possession." A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over a thing, either directly or through some other person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

OVERT ACT—any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

RACKETEERING ACTIVITY—as defined by statute includes:

(1) Any act which is indictable under Title 18, United States Code, Section 1952 relating to interstate and foreign travel in aid of unlawful activities, including the illegal importation of marihuana.

(2) Any act which violates Title 21, United States Code, Section 952, and 963 relating to the illegal importation of marihuana into the United States, and

(3) Any act which violates Title 21, United States Code, Section 841(a) and 846 relating to the illegal distribution and possession with intent to distribute marihuana.

SERIES—requirement may only be satisfied by proof of three separate offenses. In other words, the second element of Counts 19 and 20 may only be proved by proof that the defendant under consideration undertook or participated in three of the alleged importations and/or distributions.

UNLAWFUL ACTIVITY—includes any "business enterprise" involving controlled substances in violation of the laws of the United States.

UNLAWFULLY—contrary to law. So, to do an act "unlawfully" means to do willfully something which is contrary to law.

WILLFULLY—voluntarily and intentionally, and with the specific intent to do something the law forbids; that is

to say, with bad purpose either to disobey or to disregard the law.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. The indictment or formal charge against a defendant is not evidence of guilt. So the presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the defendant's guilt. A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case. A defendant is never to be convicted on mere suspicion or conjecture.

Proof beyond a reasonable doubt, therefore, is proof of such convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

C-6

ELEMENTS

To establish that the defendant under consideration committed the offense charged in Count 1, the Government must prove each of the following elements beyond a reasonable doubt:

FIRST: That the defendant was associated with an "enterprise," as I have defined for you.

SECOND: That the defendant engaged in a pattern of racketeering activity, as I have defined it, by knowingly and willfully committing, or knowingly and willfully aiding and abetting, at least two acts of racketeering activity.

THIRD: That at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October 15, 1970, and that the offenses were connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not merely a series of disconnected acts.

FOURTH: That through the commission of two or more connected offenses the defendant conducted or participated in the conduct of the enterprise.

FIFTH: That the enterprise engaged in, or that its activities affected interstate or foreign commerce.

To establish that the defendant under consideration committed the offense charged in Count 2, the Government must prove each of the following elements beyond a reasonable doubt:

FIRST: That a conspiracy to conduct or participate directly or indirectly in the conduct of the affairs of an

enterprise engaged in or affecting foreign or interstate commerce through a pattern of racketeering activity, consisting of the commission of two or more acts of racketeering activity, was willfully formed by two or more persons and was existing at the times alleged in the indictment.

SECOND: That the defendant, with knowledge of the conspiracy, willfully became a member of the conspiracy by agreeing to participate directly or indirectly in the conduct of the affairs of the enterprise through the commission of two or more offenses that comprise a pattern of racketeering activity.

THIRD: That at least one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged, in the furtherance of some object of the conspiracy, as charged in the indictment.

To establish that the defendant under consideration committed the offense charged in Count(s) 3, 4, 5, 6, and/or 7, the Government must prove each of the following elements beyond a reasonable doubt:

FIRST: That the defendant under consideration possessed marijuana on or about the date charged.

SECOND: That the defendant under consideration possessed the substance with the intent to distribute it.

THIRD: That the defendant did so knowingly and intentionally.

To establish the offense charged in Count(s) 8, 9, 10, 11, and/or 12, the Government must prove each of the following elements beyond a reasonable doubt.

FIRST: That the defendant under consideration did import a controlled substance into the United States.

SECOND: That the controlled substance was imported from a place outside the United States.

THIRD: That the defendant under consideration did so knowingly and willingly.

To establish the offense charged in Count 13, the Government must prove each of the following elements beyond a reasonable doubt:

FIRST: That an agreement existed between the defendants under consideration and other co-conspirators to possess with intent to distribute marihuana.

SECOND: That the defendant under consideration willfully became a member of such a conspiracy.

THIRD: That an overt act was committed in furtherance of the conspiracy.

FOURTH: That the overt act was committed during the period of November, 1978 through February 1980, in an effort to further the conspiracy in some way.

To establish the offense charged in Count 14, the Government must prove each of the following elements beyond a reasonable doubt:

FIRST: That an agreement existed between the defendants under consideration and other co-conspirators to import marihuana from a place outside the territorial limits of the United States.

SECOND: That the defendant under consideration willfully became a member of such a conspiracy.

THIRD: That an overt act was committed in furtherance of the conspiracy.

FOURTH: That the overt act was committed during the period of Novembér, 1978 through February 1980, in an effort to further the conspiracy in some way.

To establish the offense charged in Count 15, the Government must prove each of the following elements beyond a reasonable doubt:

FIRST: That the defendant under consideration traveled, or aided and abetted travel in interstate or foreign commerce on or about the time, and between the places, charged in the indictment.

SECOND: That the defendant under consideration travelled with the specific intent to promote, manage, establish, or carry on an "unlawful activity," as defined herein.

THIRD: That the defendant under consideration thereafter knowingly and willfully committed an act to promote, manage, establish, or carry on such "unlawful activity."

To establish the offense charged in Counts 19 and 20, the Government must prove each of the following elements beyond a reasonable doubt.

FIRST: That the defendant under consideration imported and distributed and possessed with intent to distribute marihuana, a controlled substance and that the importation, distribution, and possession with intent to distribute was done knowingly, intentionally, and willfully. In other words, you find the defendant John Doyle guilty

of one of the Counts 4, 7, 9, or 12, and the defendant David Brydie Mitchell guilty of one of the Counts 4, 6, 7, 9, 11, or 12.

SECOND: That the defendant under consideration was engaged in a continuing activity; and that the ongoing activity consisted of a series of offenses against the drug laws of the United States.

THIRD: That the Defendant under consideration undertook to commit such offenses in concert with five or more persons either named or unnamed in the indictment.

FOURTH: That the defendant under consideration occupied a position of management, control or supervision with respect to the five or more other persons.

FIFTH: That the defendant under consideration received substantial income or resources from the continuing series of violations.